IN THE

Supreme Court of the United States

October Term, 1960

No. 874

THE J. LEON CO., INC.

v.

[illegible] REISNER and FRANK A. KEATS, JR.
trading as THE KAYNAR COMPANY and
KAYNAR MFG. CO., INC.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit and Affidavit in Support Thereof

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OCTOBER TERM, 1960

No. 874

THE I. LEON CO., INC.,

Petitioner,

v.

KENNETH REINER and FRANK A. KLAUS, JR., doing business as THE KAYNAR COMPANY, and KAYNAR MFG. CO., INC.,

Respondents.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Your Petitioner, The I. Leon Co., Inc., respectfully prays for a rehearing of the Order of this Court, dated May 22, 1961, denying its Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Basic Facts

This is an action for patent infringement, which was tried before the United States District Court for the Eastern District of New York, and judgment was there entered for Defendant, Petitioner herein.

On appeal by Plaintiffs to the United States Court of Appeals for the Second Circuit, the judgment was reversed, and the patent, which previously had been held invalid, was held valid by a divided court, rejecting the reasoning by the District Court based upon *The Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.* (1950), 340 U. S. 147. Two judges voted to reverse, and to hold one claim of the patent valid, upon the basis that Congress, as the Court read the Act of 1952, 35 U. S. C. §103, had required a new relaxed standard of invention, and in accordance with the argument in *Lyon* v. *Bausch & Lomb Optical Co.*, (C. A., 2 Cir.), 224 F. 2d 530, certiorari denied 350 U. S. 911, extending the rule to the point that commercial success was sufficient to find invention, even though the elements upon which the Court found invention were not present in the claim, reading the claim as if it contained those elements. One judge voted to affirm Judge Byers' decision of the Eastern District Court on the basis that the claim was invalid.

Petitioner, Defendant, is located in a small town on Long Island. Petitioner is the largest employer in that community, and presently employs between thirty-five and forty people, with a payroll of about $150,000.00 per year. The decision in this case means hardship for the people in the community, not only for the employees, but also for the merchants and others who depend upon such employees for their livelihood. These people either support a family, or help to support a family, with their earnings. By their loss of employment, they will inflict a sharp burden upon the community which the State will have to assume by unemployment insurance, or by relief.

Petitioner has been located in the community since 1943. Also it has shown that the development of Plaintiffs' business is completely unrelated to the invention.

but arose from circumstances such as the surge of hoarding which arose as the Korean War began, with the threat of controls and shortages.

Furthermore, there has developed a conflict within the decisions of the Court of Appeals for the Second Circuit in light of the decision handed down by that Court on a patent subsequent to the decision in the case here, and just immediately prior to the filing of the Petition for Writ of Certiorari in this case, but before such decision was brought to the attention of Petitioner here.

Argument

Petitioner assigns the following reasons for granting this Petition:

Petitioner desires to make it clear that it well understands that certiorari is a matter of grace so far as such review is granted by this Court. On the other hand, it is respectfully prayed that the Court will consider the implications arising from the decision below, where the decision of a divided Court, and over the express request by Judge Clark of that Circuit for a rehearing *in banc*, is permitted to stand and wipe out the livelihood of a good portion of the town of Massapequa, New York, where, even before this case, and contrary to the protestations of Plaintiffs, but in accordance with the findings by Judge Learned Hand, Plaintiffs have maneuvered to establish themselves as almost a complete monopoly in this industry. It is submitted that, even at first glance, further scrutiny of this situation is required to seek an answer to the question, not merely on the naked question of patent law, but on the further pertinent question, is justice being done in a case such as this by permitting the decision of the Court of Appeals below to become the

judgment in this case, contrary to the finding of Judge Byers and the positive statement by Judge Swan, that Judge Byers should be affirmed, and the request by Judge Clark that the case should be heard *in banc* to remove the effect of the decision by the two senior judges, particularly in light of the facts here presented, that the rights not merely of Petitioner are being taken away by this reversal, but the rights of this entire community are being taken away by the vote of one judge on the basis of a doctrine for which there is no authority in this Court, or any other Circuits.

The decision of the Court below assumes as fact that which was not proved in the case here. As shown by the accompanying affidavit, the facts of the situation are, as most probably known to the members of this Court, that the Korean conflict which ensued after the alleged invention of the suit patent, created an unexpected market for anything of metal, as merchants and speculators looked forward to the bonanza of having hoards of materials in short supply on which to make their fortunes. But that bubble burst, and those who had clips had to get rid of them, or face bankruptcy. They did get rid of them, and clips penetrated the market. And with it came the days when a woman no longer could afford to hire help for her hours, but did find ways to do things herself so as to stretch her income for what she considered her needs. And hair dressing was one of those necessities. That meant that something as expensive as a beauty parlor, in many cases, was out of the question, so the result was hair setting at home. Thus the basic reason for patentability in the decision of the Court of Appeals below, that there was commercial success, fades out when the actual facts appear, that the commercial success arose from the incidents of the Korean War with the increase of do-it-yourself.

But there are other reasons why, it is submitted, this Petition should be granted.

Since the decision of the Court below, where the decision of invalidity of the District Court on the basis of aggregation, founded in the *A. & P.* case, was upset by Judge Learned Hand's reasoning as to the alleged mandate from Congress for a relaxed standard of invention, that same Court itself obviously has not followed Judge Learned Hand's rule. In *Langdon* v. *Saltser & Weinsier Inc.*, 175 F. Supp. 96, Judge Zavatt, in the United States District Court for the Eastern District of New York, held, just as did Judge Learned Hand in the case here, that where a device satisfies an old and recognized want, invention is to be inferred, rather than the exercise of mechanical skill. Judge Zavatt also found that the mere accomplishment of the same result is insufficient to find infringement, even if the claim literally reads, that where there is a change in principle from the patented device, that should be considered in defeating the charge of infringement.

The same Court of Appeals, in a still unreported decision, October Term, 1960, Docket No. 26139, in the case argued on February 8, 1961, on appeal from Judge Zavatt's decision, after the decision of the present case, and decided on March 14, 1961, made no reference at all to the present case for its rule. But the Court there held the patent *invalid* upon the basis of the same patents specifically discussed by Judge Zavatt in the District Court, and over which the District Court had held the patent there in suit valid.

In that case, the prior patent had issued *more than twenty years* prior to the original application of the patent there in suit. This did not impress the same Court of

Appeals in that case, even though it had impressed the District Court there. Yet, in the case here, the same Court made much of the fact, in fact based its decision upon the fact, that supposedly from 1932 to 1946, there had been a failure of the art to reach the conclusion of the suit patent's idea, and thus the Court found a "long felt want was being filled" even though there was no evidence to that effect except the prior art itself. In the case here, there was no finding by the District Court as to a long felt want. But in the *Langdon* case, there was an express finding by the District Court, that there had been a "long felt want". Thus, there is this conflict of decision within a few months, in the same Court, on this question as to whether long felt want is a basis for patentability. It is submitted that this requires correction in the present case particularly in view of the effect upon the economic status of the innocent bystanders in the case at bar. It should not be, as Judge Clark said in *Hyde Park Clothes* v. *Hyde Park Fashions* (C. A., 2 Cir.), 204 F. 2d 223, that the decision of the case should lie merely in the caprice of the selection of the panel.

Also, in the *Langdon* case, the reissue patent there was held *invalid* on the basis that the claims submitted in the reissue, although condemned in the reissue oath as being inoperative, insufficient and defective, still were retained. In the case here, before the Court of Appeals, the same premise was laid down to sustain the same conclusion, that the reissue patent, which was the suit patent in the case here, was invalid because the reissue oath declared one thing, but the claims submitted and obtained were contrary to that reissue oath. The Court of Appeals, in its opinion in the *Langdon* case (p. 1027 of its own bound opinions) says:

> "We are of the opinion that such an oath is not to be taken lightly, and that Langdon is estopped

> to disregard his former contention that the claim in suit does not clearly distinguish from the prior art."

Yet, in the case here, the same Court of Appeals rejected the very same basis for a holding of invalidity of the suit claim. This statement was made to the Court of Appeals in the instant case, that

> "* * * The reissue oaths (D. 72b, 77b) lay a basis for the reissue in the fact that the suit patent's spring was in a form which curved *forwardly around* the axis upon which the plates rock. Despite this statement in the reissue oath, that this was the reason why reissue was sought because the claims did not so define, the suit claims are not so specifically limited."

Yet, despite these statements, the Court of Appeals, which later held the reissue oath could not be taken lightly, in the instant case refused to give weight to the fact that the statements made the basis for the reissue should have such weight.

Furthermore, the arguments in the reissue oath were held sufficient, in the *Langdon* case, to estop the patentee from asserting breadth of claim sufficient to include that which, by the argument in the oath, was excluded, although the express words of the claim did not exclude. Yet here, that same basis was urged and set forth in full, but summarily set aside because of the doctrine of the *Bausch & Lomb* case, which certainly should have had as much bearing in the *Langdon* case, as it was considered to have in the present case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Order of this Court, denying its Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit, be reheard and vacated, and the Petition be granted.

Dated: New York, New York,
June 14, 1961.

Very respectfully submitted,

HENRY L. BURKITT,
Attorney for Petitioner,
Defendant-Appellee,
Office and Post Office Address,
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New York 36, New York,
MUrray Hill 2-7498.

Certificate of Counsel

The undersigned, HENRY L. BURKITT, Attorney for Petitioner, hereby certifies that the Petition for Rehearing filed in this cause is presented in good faith, that in his judgment said Petition is restricted to the grounds specified in paragraph 2 of Rule 58, as amended, and that said Petition for Rehearing is not interposed for delay.

HENRY L. BURKITT,
Attorney for Petitioner,
Defendant-Appellee.

Affidavit of Louis Leon in Support of Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 874

THE I. LEON CO., INC.,

Petitioner,

v.

KENNETH REINER and FRANK A. KLAUS, JR., doing business as THE KAYNER COMPANY, and KAYNER MFG. CO., INC.,

Respondents.

State of New York
County of Nassau—ss.:

LOUIS LEON, being duly sworn, deposes and says:

1. I am Secretary and Treasurer of The I. Leon Co., Inc., Petitioner, Defendant herein. I am fully conversant with the facts in the case heretofore presented, and with the facts regarding which I am making the present statement.

2. The business of Petitioner was established a number of years ago. Since 1943, the business has been located in Massapequa, Long Island, New York. Our business has, in large measure, been directed to supplying

the professional beauty parlor trade, as against the lay persons who set and dress their own hair. My father before me, and now my brothers and sister and myself, have operated the present business, and have sought to create a market for our hair clips in the field of professional beauticians, who own their beauty parlors, and who have to meet special problems in their work.

3. For instance, our company owns Letters Patent Nos. 2,467,487, issued April 19, 1949, on the application of Leonardo I. Leon, filed April 6, 1944, D. Ex. S, and Des. 138,901, issued September 26, 1944, on the application of Leonardo I. Leon, filed August 1, 1944, D. Ex. R. Both of these patents were issued for hair clips, and the patents were issued to my father, since deceased. These clips are identified in the trade as the "Colanite" clip. As the record below shows, these clips were made of aluminum, with a rubber member to serve as the spring for closing the jaws of the clips together. The reason why aluminum was used for the "Colanite" clip, and not the steel of the clips of the suit, is because the solution used by beauticians chemically attacks steel, and causes discoloration of the solution, and thereby of the hair itself. Aluminum is non-reactive with such solution. Beauticians, who long had used nothing but enameled hairpins or so-called bobby pins, turned with great reluctance, and only after considerable sales pressure on our part, to the use of the aluminum "Colanite" clips, as against bobby or hair pins.

4. Our organization it was which did the pioneer work to build up a very extensive business among beauticians for the aluminum clips. At one time, we employed one hundred five people just for the manufacture and sale of that one clip. We were first in the field, and we converted the beautician to the use of these aluminum clips.

This clip is the clip to which Reiner, one of the Respondents, referred in his testimony as being that to which he had referred, which he had in front of him, when he designed the clip for which he then sought Letters Patent, the suit patent.

5. As I have said above, our organization is located in a small town, Massapequa, on Long Island. Our staff of thirty-five to forty employees means, in many cases, that many complete families rely upon single wage earners. We have a payroll of about One Hundred Fifty Thousand ($150,000.00) Dollars a year. That means a great deal in a community like ours. The loss of a job by each of these wage earners will mean a tightening of the belt in this community by each of those families. It will mean not merely the loss of a job by this wage earner. It will mean the loss of earning power on the part of a group of merchants who live off these wage earners who deal locally for their various needs. Our organization, I believe, is the largest single employer in the community. We employ four salesmen who go out to get the business for our concern. The result in the case here, in which Judge Byers' decision has been upset by the two to one decision in the Court of Appeals, will require us to close our doors, and throw these people out of work.

6. We were selling the "Colanite" clip for Four ($4.00) Dollars per hundred when the clip of Plaintiffs, Respondents herein, first came on the market in 1948. Plaintiffs, who had no experience in the beauticians' field, sought to undersell the "Colanite" clip, first pricing their clip at Three Dollars and Fifty ($3.50) Cents per hundred. The beauticians refused to have anything to do with Plaintiffs' clip. The steel contaminated the permanent waving solution.

7. Plaintiffs then dropped their price in successive stages as they sought to penetrate the field. They dropped their price from $3.50 down to Two ($2.00) Dollars per hundred, but still could not get the beautician to accept the steel clip.

8. Then came the Korean War. When the announcements came out of Washington, indicating the possibility of re-establishing the controls over metals which had been in effect during World War II, with the shortages thus created, and with the remembrance of those conditions, the sale of hair clips reached tremendous proportions as the supply houses bought without relation to immediate needs of the market, in order to have these clips on hand for sale after the expected restrictions went into effect.

9. Then came the realization that no controls were to be imposed. There was no shortage. Those who had bought clips to hoard them found themselves with inventories which they had to dump. Extreme salesmanship then ensued to make the markets for these hoarded clips. That was the reason for the great volume of sales shown at that time.

10. Plaintiffs never got more than $2.00 per hundred for their clips in this period, and up to June, 1950. In the meantime, our "Colanite" clip dropped in price only to $3.50 per hundred.

11. Our concern created the market for the aluminum clip in the beauticians' field, as distinct from the general do-it-yourself market of the drugstore and the five and ten cent store, in which Plaintiffs' clips found their greatest market. Beauticians still will not use the steel clip, even ours, but the beauticians still buy the "Colanite" clips. The public itself, turning to do-it-yourself, could

get their clips on the five-and-ten cent store counters where there are massive displays of every possible means for hairdressing, including curl makers, holders, and many other different kinds of hair waving devices and solutions.

12. In our organization, we had a steel clip long before we entered upon the production or filed application for Letters Patent therefor. We were always well aware of the reasons why the beauticians were antagonistic to the steel clip. We did nothing to bring the steel clip upon the market since my father before us, and we, have devoted ourselves to developing the market in the field of the beautician who at that time was the greatest outlet for beauty items.

13. Contrary to the statement in Judge Learned Hand's opinion, the hair clips sold in the five-and-ten cent store to the general public is not considered a reusable item. Their sales would hardly be very much if the first sale would be the only sale. It is because the clip has a very short life that the sales have increased as the general public has turned more and more to acting as its own beautician in the setting of hair. On the other hand, in the case of the "Colanite" clip, the replacement of those clips by the beautician is a steady amount, as the clips wear out from continued use, day by day, in the beauty shops. The cost of such clips is an important item to the beautician, and they attend to saving clips for successive use. It is too well known to require repetition here, that the complete setting of the hair is performed in the beauty parlor so that, when the woman walks out, she does not carry a load of metal upon her head, something which can be seen on the heads of the many girls as they parade around the streets with a mass of hair clips on their heads after they themselves have

"set" their hair. The beautician sees to it that he reclaims the clips from the hair, and that his work is completed, by the time the client walks out. Thus there is constant reclaiming of the aluminum clips, and the return of those clips to repeated use in a beauty parlor, while the girl who takes her clips to her office with her, does not necessarily see to it that she returns those clips home again.

14. At the present time, our business requires the sale of the steel clips which we designed without relation to the clip which Plaintiffs had marketed, in order to retain and employ the staff which presently operates our plant.

15. Our development of our clip was in no way related to the clip of Plaintiffs. Our concept had nothing to do with any hooking of the two members together, as is quite apparent from the comparison of the two clips, as discussed in the briefs. We used positive action to hold the two plates together. We knew how it had been usually done in the past to press the plates of clips together by a positive spring, without the use of a hook. And we knew how spring plates were held positively against separation by means of ears and trunnions. We tried a clip such as ours, first without the barbs. We found that if pressure were applied in a certain way, the clip plates might jump apart. We then did what the prior art showed us. We formed ears and trunnions, turned inwardly from one plate to engage over the other plate, as the trunnions engage in the ears of previous clips. None of this was in the suit patent. After we got our barbs working, nothing could separate the plates of the clips. Our first development, made by our toolmaker, was not marketed because we could not get the proper response from the beauty parlors. We could not even

consider building up the public to "do your own hair" with the use of such clips as this necessarily would have antagonized the source of our most lucrative business.

16. I state these facts to show that the alleged commercial success of Plaintiffs' clips had absolutely nothing to do with their invention. We had the clip to market, but we could not make a market for them because of the refusal of the beautician to use a steel clip. When the Korean War made anything marketable, and Plaintiffs' clip got on the market, under the circumstances I have set forth, and do-it-yourself became the practice of increasing numbers of people who did not use beauty parlors, we brought our first clip on the market, and then, when the plates would jump apart, we went to the clip which used the trunnion-ear formation of the prior art, a structure for which there was not the slightest suggestion in the suit patent.

LOUIS LEON

Sworn to before me this
10 day of June, 1961.

MARGARET HAYDEN
Notary Public,
State of New York
No. 30-1717890
Qualified in Nassau County
Term Expires March 30, 1963

(SEAL)

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JAMES R. BROWNING, CLERK

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OCTOBER TERM, 1960

Docket No. 874

THE I. LEON CO., INC.,

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KENNETH REINER and FRANK A. KLAUS, JR., doing business as THE KAYNAR COMPANY, and KAYNAR MFG. CO., INC.,

Respondents.

ADDENDUM

for Petition for Rehearing of Order Denying Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

An important additional fact has developed since the printing and forwarding of the Petition for Rehearing, which fact, it is submitted, will be found to be of great importance on the determination of the Petition for Rehearing.

Before the Petition for Certiorari was ready for service and filing, Petitioner sought a license from Respondents. When the Petition for Writ of Certiorari was served, Respondents requested sixty days for their Reply Brief because (a) they desired to negotiate for the purchase of

the assets of Petitioner, including the patents for the "Colanite" clip, and the patents under which Petitioner was making its steel clip, the one charged as infringement, and (b) the owners of Respondents' business had fallen out and were dividing up their assets; and the first negotiations could not be carried on until the differences between the Respondents had been resolved. Petitioner was assured that Respondents were sincere in their desires to purchase the business and assets of Petitioner.

The Attorney for Petitioner refused to consider any such extended period, and granted a short extension of time for a Reply Brief. Strangely enough, despite repeated requests for additional extensions of time right up to the last minute, the Reply Brief was served and filed before the date of the extension granted.

After the denial of the Petition for Certiorari, there was a long lapse, during which correspondence was left unanswered, until a few days ago, when a letter was received from the Attorneys for Respondents, that the negotiations were still to proceed.

At the time the Petition for Certiorari was being filed, Respondents had made what appeared to be a firm offer, which was far below the real value of the fixed assets of Petitioner. Papers were prepared, and were in the stage of being negotiated to a final agreement.

On June 14, almost at the end of the business day, Respondent Reiner called Louis Leon, the affiant of the affidavit submitted in support of the Petition for Rehearing, to make an offer which was far below the offer which Respondents had made originally, and which was completely unacceptable to Petitioner as it amounted to taking over the assets of Petitioner as if it were already defunct and bankrupt. That offer has been refused. That offer in-

cluded a provision for the taking over of the patents of Petitioner for both the "Colanite" clip, and the steel clip which Petitioner has heretofore manufactured.

Thus, Respondents have confirmed the belief that they were negotiating only for the purpose of maneuvering to destroy the possibility that the Petition for Certiorari would be granted. On the Petition for Rehearing, it is obvious that they have waited until almost the final hour for the filing of the Petition for Rehearing to "hold a gun at the head" of Petitioner.

It is respectfully submitted that these facts are important, to show that Respondents are indeed maneuvering to perfect an illegal monopoly in this field, and just as in the *Altoona Publix* case, the Writ of Certiorari should be granted to assure against the creation of any such illegal monopoly.

Very respectfully submitted,

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